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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1291

WILLIAM L. TAUB,
*Petitioner*

v.

RANDOLPH HALE (a/k/a RANDOLPH HALE-ALCAZAR THEATRE), UNITED STATES MARSHALS, ALBERT GINS AND MELVIN J. KATZ, and all other ATTORNEYS and AGENTS for RANDOLPH HALE,
*Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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H. Hugo Perez, Attorney for William L. Taub petitioner herein, on his behalf respectfully presents this petition and requests that the Supreme Court of the United States grant this petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in the above captioned case.

## PER CURIAM OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Appeals for the Second Circuit No. 203, September Term 1965 decided January 14, 1966, is set forth infra as an Appendix hereto at page 1a.

Petitioner's request for a Hearing en banc by the same Court was made orally and denied on December 5th, 1965 and therefore is not set forth in the appendix.

## JURISDICTION

Petitioner relies, as the basis for jurisdiction of this Supreme Court of the United States, upon Section 1254 of Title 28 of the U. S. Code. Petitioner declares and verily believes that there are very ". . . special and important reasons . . ." which call for a grant of review on Writ of Certiorari in the "sound judicial discretion" of this Honorable Court within the meaning of Rule 19, as more specifically set forth immediately following in the questions presented for review and arguments amplifying the reasons relied on for allowance of this Writ.

## QUESTIONS PRESENTED

1. Have Petitioner's constitutional rights of Representation by counsel been violated when District Court barred his counsel from any further participation in proceedings before it at time when substantial property rights were determined and adjudicated and Petitioner had no counsel.

2. Whether Petitioner's Constitutional Rights to Due Process were violated by refusal of District Court to permit a trial on the merits when dismissing case with prejudice under FRCP 41(b) there

having been an "Impossibility to prosecute" set of facts rather than a "failure to prosecute".

3. Were Constitutional rights of Petitioner violated by failure of Court of Appeals to require his former counsel to make available all pertinent documents essential to the Appeal, wilfully withheld by said counsel.

## STATUTES INVOLVED

United States Constitution
United States Code
Federal Rules of Civil Procedure. Rule 41(b)

## STATEMENT

The affirming Opinion of the U. S. Court of Appeals for the Second Circuit, cast grave doubts as to its being a sound and just decision, in that the same conveniently sidesteps basic constitutional questions before that body for adjudication, questions which merit serious consideration, affecting fundamental constitutional rights of this petitioner, which were set forth in the written briefs and also presented orally to that Court.

One of the basic purposes of the Due Process Clause is to protect a person against having burdens so irreparable upon him, except be it in accordance with the valid laws of the land. By implication in such constitutional safeguard is the promise that the law must be one that carries an understandable meaning with legal standards enforceable by the Courts. Such is not the case in the mentioned decision, of the U. S. Court of Appeals for the Second Circuit.

The Opinion (Appendix, infra) failed to apply the accepted law and weight of authority to the *exact* facts

supporting the argued appeal, in that the plaintiff-appellant therein, was actually under an "impossibility" to prosecute his cause in the Court below (District Court). Petitioner states that from December 1963 to October 1964, he was in fact without counsel to represent him; Judge Palmieri having dismissed petitioner's counsel just prior to petitioner's family signing stipulation-settlement, to which petitioner has vehemently objected and refused to sign; and the same judge barring his attorney from actively representing this petitioner. These facts coupled with Judge Palmieri's staying of all proceedings since December 23, 1963; and petitioner's sickness, nearly fatal; this fact known to Judge Palmieri who arraigned petitioner December 11, 1963, brutally and forcefully taken out of his sick bed appearing in pajamas before the Judge and not allowed to be represented by counsel, in flagrant violation of his constitutional rights. While Appeal was pending Judge Palmieri disqualified himself as to the case of *Taub* v. *Hale* on July 9, 1965, as the record below shows (Proceedings in the District Court for So. Dist. NY) The disputed issue here is the District Court's dismissal with prejudice due to an "impossibility to prosecute" while we understand the rule of law to be for "failure to prosecute."

Petitioner's counsel, on January 5th, 1966, arguing the appeal, as well as the U. S. Court of Appeals Second Circuit, both were prejudiced by the lack of necessary documents, to wit, a $100,000.00 assignment, contracts, etc.; all indispensable and pertinent to the appeal; documents which were the timely object of a "Motion for Emergency Order to Turn Over Original Files" which was never acted upon by the Court before the Appeal, but until more than two months subsequent to the Argument of the Appeal, when said

motion was denied on March 17, 1966; all this to the great damage and detriment of petitioner's rights. These documents and files are today still in the possession of petitioner's former counsel. Obviously, petitioner's present counsel was unable, at the time of the argument of said Appeal, to answer certain questions from the Bench, which had a direct bearing on the Court's decision, which decision reveals on its face, inconsistencies, indicating that the Court did not take the time to deliberate on the seriousness of the issues, but arrived at its conclusion by turning papers once over lightly. In its findings (Opinion, infra, Appendix) page 2a we read: ". . . and none of the named parties has ever been served." Yet in its conclusion, page 2a on this same point the Court speaks only of delay in Service: "There was also a long and unnecessary delay in Service . . . " Petitioner states that Messrs. Katz and Gins were served and both have indeed appeared in all proceedings in the case of *Taub* v. *Hale.*

If Justice is to be done and administered fairly, a Court ought to know all the pertinent facts previous to rendering an Opinion. Then, Courts will not act on surmise, guess or conjecture, but proceed with insight and understanding.

## ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR THE GRANTING OF A WRIT

The principal two cases cited by the U. S. Court of Appeals Second Circuit to support their affirming Opinion, which could as well be cited as authority to reverse and remand, are not cases in point. The first one, *Link* v. *Wabash R. Co.,* 370 U.S. 626 (1962), Northern District, Indiana, was then the oldest case on its dockets (6 years old), as against 14 months in *Taub* v. *Hale.*

Yet, this Honorable Court was divided with strong dissents by Chief Justice Warren, Justice Black and Justice Douglas. Furthermore in the decision of this Honorable Court in this *Link* case, Justice White and the late Justice Frankfurter neither one participated. May I call this Honorable Court's attention to the last sentence of the last paragraph of the dissent at 370 U.S. 649: "I fear that this case is not lkiely to stand out in the future as the best example of American Justice."

In *Taub* v. *Hale,* towards the end of Petitioner's convalescence, he hired Special Process Server, several California Counsel were consulted and retained, in an all out effort to serve Defendant Hale in person. But most of the time Petitioner remained without counsel and was prohibited from engaging counsel of his own choice. If responsibility for Petitioner's alleged dilatoriness is placed on any one it should be placed squarely on the District Judge who took away his right to counsel, the very same Judge Palmieri who dismissed with prejudice the action of *Taub* v. *Hale* in the U. S. District Court, Southern District of New York. The prejudice is obvious on the part of the District Judge and on this ground alone the Order of Dismissal with prejudice should have been reversed and remanded.

The other case relied upon by the U. S. Court of Appeals Second Circuit in its Per Curiam decision, *Messenger* v. *United States,* 231 F. 2nd 328 (2nd Cir. 1956), in which dismissal under Rule 41(b) was warranted due to ". . . six years of a complete lack of any prosecutor effort" is clearly distinguishable from the case at bar, *Taub* v. *Hale* in which there were present, factors affording a genuine justification for the alleged

delay; for Petitioner was 10 out of 14 months barred from having counsel and simultaneously sick for about 6 months, under Doctors (M.D.s) orders and under doctors and nurses care, suffering of yellow jaundice and hepatitis, as authoritatively diagnosed by reputable Medical Doctors. Thus 4 months as a lapse of time, is not such dilatoriness, we submit, as to constitute neither a sound nor a fair basis for the dismissal with prejudice by the District Court.

Such Order of Dismissal has inflicted so harsh and irreparable injury on a sick man and his family, both without counsel at a time so crucial in the prosecution of his cause; when the only request Petitioner has is that he be given a fair hearing and his day in Court on the merits, of his cause of action, may the chips fall where they may. Said dismissal with prejudice, considering the surrounding circumstances should not fall within the purview of FRCP 41(b). Petitioner's rights have been arbitrarily ignored and destroyed, and his property confiscated without Due Process of Law, all of which is extremely offensive to our Federal and State Constitutions.

WHEREFORE, the foregoing premises considered, it is urged upon this Honorable Court, that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

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